No. 14-1457

# In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
*Petitioner*,

v.

STATE OF MONTANA,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

The State does not dispute that the lower courts are squarely divided on the question of constitutional law presented in this case: whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution. Nor does the State dispute that this case is an ideal vehicle for resolving this long-percolating question.

The State makes three arguments against granting certiorari, but none of them has any merit. Indeed, the Brief in Opposition underscores the need for this Court to resolve the question it reserved in *Pollard v. United States*, 352 U.S. 354, 361 (1957).

First, the State acknowledges the existence of a split, but argues it is not "genuine" because the many cases that have rejected the State's position supposedly lack "meaningful reasoning or analysis." BIO 13-14. This observation belies the express disagreement among the lower courts about *Pollard*'s import, a disagreement sharpened by opposing, substantive views about whether speedy trial protections ought to attach at sentencing. Even after the Petition was filed, the Fifth Circuit acknowledged that "[t]he circuits are split on the question," but declined to revisit its precedents on this issue. *See United States v. Washington*, No. 14-10623, 2015 WL 5607653, at *2 & n.2 (5th Cir. Sept. 24, 2015).

Second, the State asserts that the question is "academic," because, in the State's view, "the Due Process and Speedy Trial tests are essentially the same." BIO 11. That argument is inconsistent with the State's own position in the Montana Supreme Court, where the State urged the adoption of a due process

over a Sixth Amendment framework. It rests on a fundamental misreading of the cases, which recognize real analytic and practical differences between the two tests. And it cannot be squared with the recurring and persistent nature of the question presented or the question's effect on substantive rights.

Third, whether the Montana Supreme Court's decision was correct on the merits, *cf.* BIO 17, furnishes no reason to deny review given the intractable conflict over the question presented. Nor is the State's defense of the Montana Supreme Court's ruling persuasive. This Court's precedents, and the original understanding and purpose of the Sixth Amendment, indicate that the Speedy Trial Clause properly applies to criminal proceedings through sentencing and judgment.

This Court should grant certiorari and finally "provide the clarity currently lacking in the law of the various circuits (and state highest courts) on this issue." *Washington*, 2015 WL 5607653, at *4 n.3 (Haynes, J., dissenting).

## I. There Is A Deep, Mature Split Of Authority On The Question Presented.

1. The State does not—and cannot—dispute that both federal and state courts are squarely divided on the question presented.

The State acknowledges that "there is technically a split," BIO 17, but tries to minimize the divide in the lower courts by contending that "very few courts have actually given the issue reasoned consideration." BIO 1. The State's characterization of the split as superficial is wrong. As the Petition explains, Pet. 6-12, there are reasoned opinions on both sides of the

split, staking out opposing views about the controlling Sixth Amendment principles, history, and policies. Some courts have concluded that "[a] call for speedy disposition after trial addresses similar concerns" to those implicated by pretrial delays, *see State ex rel. McLellan v. Cavanaugh*, 498 A.2d 735, 739 (N.H. 1985) (Souter, J.), while others have concluded that "sentencing proceedings and trials are separate and distinct phases of criminal prosecutions" for Sixth Amendment purposes, *see United States v. Ray*, 578 F.3d 184, 198-99 (2d Cir. 2009).

In any event, even if the division in the state and federal courts flowed from conclusory judgments about whether *Pollard* supports applying speedy trial protections at sentencing, there remains a pressing need for this Court's intervention. "The circuits are [still] split on the question," *Washington*, 2015 WL 5607653, at *2 n.2, and the split will not resolve itself until the Court answers the question left open in *Pollard*.

2. The State provides no reason to believe that courts will now begin to coalesce around the view endorsed by the Second Circuit in *Ray*, and by a number of state supreme courts. On the contrary, courts have become only more entrenched since *Ray* was decided six years ago. This past spring, the First Circuit "decline[d]" to follow *Ray*. *United States v. Carpenter*, 781 F.3d 599, 609 (1st Cir. 2015). Then, in September, the Fifth Circuit, acknowledging *Ray*, nonetheless reaffirmed its longstanding precedents holding that the Speedy Trial Clause applies to sentencing. *Washington*, 2015 WL 5607653, at *2 & n.2. On the other side of the debate, the Kansas Supreme Court dug in its heels: "absent a ruling from the United

States Supreme Court explicitly extending speedy trial protections to sentencing, we see no reason to change course." *State v. Pressley*, 223 P.3d 299, 302 (Kan. 2010). The State points to only one court—the court authoring the decision below—that reversed course and followed *Ray*. This is hardly an "emerging trend," BIO 17.

The State is therefore simply incorrect that "the prudent course is to wait to see how the issue settles once lower courts have considered the issue in depth." BIO 2. Lower courts have waited decades for resolution of this unusually deep and mature conflict; the "prudent course" would be to finally intervene and answer the question left open in *Pollard* nearly sixty years ago.

## II. The Question Presented Is Important.

1. The State does not deny that the question presented is potentially implicated in every criminal case where sentencing is delayed. It makes no effort to refute the significant practical consequences of sentencing delays that are documented in the Petition. Pet. 15-16. And it does not dispute that under this Court's precedents, the due process test requires an affirmative showing of prejudice while the Sixth Amendment *Barker v. Wingo* test does not. *See* 407 U.S. 514, 532 (1972); BIO 10.

*Barker* established a multi-factor "balancing process," requiring the court to consider prejudice alongside the length of the delay, the State's proffered excuse, the defendant's assertion of speedy trial rights, and "such other circumstances as may be relevant." 407 U.S. at 530, 533. No single factor, the Court stressed, is "a necessary or sufficient condition." *Id.*

at 533. In contrast to this Court's due process test, then, which requires a showing of prejudice, *Barker* treats prejudice as a *factor* to be considered and not a prerequisite to relief. Pet. 17-19.

2. The State contends that the choice between the due process and Sixth Amendment frameworks is merely "academic" because the lower courts have supposedly imported an affirmative prejudice requirement into the post-conviction *Barker* analysis. That is incorrect.

a. As an initial matter, the State's position now is impossible to reconcile with the position it took in the Montana Supreme Court. Below, it contrasted the due process test with what it characterized as the "ill-fitting speedy trial test" for sentencing delay claims. Brief of Appellee at 15, *State v. Betterman*, 342 P.3d 971 (Mont. 2015) (No. DA 13-0572), 2014 WL 4659615, at *15. If there were really no difference between the due process and *Barker* tests, there would have been no reason for the State to ask the Montana Supreme Court to reverse its prior holding in *State v. Mooney*, 137 P.3d 532, 535 (Mont. 2006), that the Speedy Trial Clause applies to sentencing delays. And if the difference between the Sixth Amendment and due process frameworks really is "academic," the Montana Supreme Court would have seen no need to revisit its precedents. The reason the State pressed the issue and the Montana court reversed *Mooney* is simple: because the difference between the tests affects the outcome of cases.

b. The cases applying the Speedy Trial Clause to sentencing confirm that the Sixth Amendment test differs meaningfully from the due process test. In

fact, contrary to the State's assertions, there is not a single Sixth Amendment case that has categorically required a showing of prejudice.

Many of the cases that apply the *Barker* factors to sentencing delay, including the cases that the State cites, have expressly rejected an affirmative prejudice requirement. The Delaware Supreme Court, for example, has explained that "an affirmative demonstration of prejudice is not required to find a deprivation of the right to speedy sentencing." *Harris v. State*, 956 A.2d 1273, 1278 (Del. 2008); *accord Jolly v. State*, 189 S.W.3d 40, 45-49 (Ark. 2004) (analyzing all four *Barker* factors in turn, and applying the presumption of prejudice from *Doggett v. United States*, 505 U.S. 647, 651-52 (1992), based on length of the delay in sentencing, rather than requiring a showing of actual prejudice).

Others emphasize that all four *Barker* factors must be considered, offering no indication that prejudice is a bright-line requirement. *See, e.g.*, *Gonzales v. State*, 582 P.2d 630, 635 (Alaska 1978) (considering each *Barker* factor, including prejudice, to conclude that no violation occurred and never suggesting that a higher prejudice standard applies at the sentencing phase).

Only a month ago, the Fifth Circuit applied *Doggett*'s presumption of prejudice to find that an eight-year sentencing delay had violated the Speedy Trial Clause, and did so over an emphatic dissent. *See Washington*, 2015 WL 5607653, at *3; *id.* at *4 (Haynes, J., dissenting) ("Even assuming that the *Barker* factors are appropriately considered in this context, it is inappropriate to import wholesale to the

sentencing context the presumption of prejudice line of cases arising from pre-trial delay situations."). The dissent specifically noted that the defendant's claim would have turned out differently if he had been required to show prejudice. *Id.* at *7.

3. The cases the State cites suggest only that some courts weigh the *Barker* factors differently at the sentencing phase, placing a stronger emphasis on the prejudice factor. *See* BIO 10-11. For example, the State contends that the Tenth Circuit was the first to adopt the supposed prejudice requirement, citing *Perez v. Sullivan*, 793 F.2d 249, 256 (10th Cir. 1986). BIO 10. But neither *Perez* nor subsequent Tenth Circuit cases held that a defendant must show prejudice to prevail on a speedy trial claim arising out of a sentencing delay. *Perez* recognized that "a showing of prejudice may not be absolutely necessary in order to find a Sixth Amendment violation," expressing only "great reluctance to find a speedy trial deprivation where there is no prejudice." 793 F.2d at 256 (internal citation omitted); *see also United States v. Yehling*, 456 F.3d 1236, 1245 (10th Cir. 2006) (weighing all four *Barker* factors, including prejudice, and noting that "none of the *Barker* factors are dispositive"). In the same vein, the First Circuit has made clear that "[n]one of these [*Barker*] factors is a necessary or sufficient condition," but noted courts' "great reluctance to find a speedy trial deprivation" absent "substantial and demonstrable prejudice." *United States v. Nelson-Rodriguez*, 319 F.3d 12, 60-61 (1st Cir. 2003).

Initially, the Third Circuit reserved the question of whether prejudice is required to establish a Speedy Trial Clause violation in the sentencing context. *See*

*Burkett v. Cunningham* (*Burkett I*), 826 F.2d 1208, 1223 n.35 (3d Cir. 1987). Then, four years later, the circuit confirmed that each *Barker* factor should be considered in turn. *See Burkett v. Fulcomer* (*Burkett II*), 951 F.2d 1431, 1442-43 (3d Cir. 1991). Addressing *Perez*, the Court explained that "the change in the status from 'accused and presumed innocent' to 'guilty and awaiting sentence' is a significant alteration which must be taken into account in the balancing process." *Ibid.* The Court emphasized, however, that this change in circumstance "does not diminish in any way the balancing test which must be employed in evaluating such claims." *Id.* at 1443.

The only one of the State's cited cases that adopts an affirmative prejudice requirement, *United States v. Westmoreland*, 712 F.3d 1066, 1078 (7th Cir. 2013), is not about sentencing delay at all. Rather, *Westmoreland* involved a *post*-sentencing delay in the trial court's ruling on the defendant's motion for a new trial. *Id.* at 1077. By contrast, when discussing sentencing delays, the Seventh Circuit has noted that the *Barker* factors "are factors and not requirements; all four must be evaluated, considered, and weighed." *United States v. Rothrock*, 20 F.3d 709, 712 n.2 (7th Cir. 1994).

The State's cited state-court cases similarly decline to impose an actual prejudice requirement for speedy trial claims based on sentencing delays. Some expressly "[c]onsider[] the [*Barker*] factors together." *E.g.*, *Bodnari v. State*, 839 A.2d 665 (table), 2003 WL 22880372, at *3 (Del. Dec. 3, 2003). Others hold that the "factors are the same . . . in a speedy sentencing case"—they are merely "balanced differently," with prejudice "dominat[ing]" the speedy trial analysis fol-

lowing conviction. *E.g.*, *Perdue v. Commonwealth*, 82 S.W.3d 909, 912 (Ky. 2002). And another of the State's authorities neither addresses sentencing delay nor applies the Sixth Amendment. *See Hoang v. People*, 323 P.3d 780, 789 (Colo. 2014), *cert. denied sub nom. Hoang v. Colorado*, 135 S. Ct. 233 (2014) (applying the due process test to an *appellate* delay, characterizing the *Barker* factors as "useful in conducting this due process analysis").

In summary, the State is wrong to suggest that the circuits and state high courts have imported a categorical prejudice requirement for speedy trial claims in the sentencing context. The State has failed to identify even a single case that has adopted such a requirement.

## III. The Montana Supreme Court Is Wrong On The Merits.

The Montana Supreme Court's analysis is also wrong on the merits. The proper reading of the Sixth Amendment would apply the Speedy Trial Clause to sentencing-phase delay. The State's arguments are grounded in demonstrable misunderstandings of this Court's precedents on sentencing error, and of the Framers' understanding of the Sixth Amendment.

1. The State reiterates the Montana Supreme Court's purported concern that applying the Speedy Trial Clause to sentencing delays would create "tension" with this Court's precedents on sentencing error. The State asserts that the only remedy available for unconstitutional sentencing delay is to dismiss the indictment under *Strunk v. United States*, 412 U.S. 434, 438 (1973). BIO 18. The State then argues that applying this remedy for a sentencing delay cre-

ates a "serious tension" with *Bozza v. United States*, 330 U.S. 160 (1947), which it cites for the proposition that a defendant should not go off scot-free due to a court's "error in passing sentence." BIO 17-18 (quoting *Bozza*, 330 U.S. at 166).

The "tension" envisioned by the State is illusory, however. First, as multiple lower courts have recognized, *Barker* and *Strunk* did not involve sentencing-phase speedy trial violations. These lower courts have accordingly concluded that dismissal of the indictment is not the only proper remedy for such a violation. *See, e.g.*, *Washington*, 2015 WL 5607653, at *3 (vacating sentence due to eight-year delay in sentencing, but noting that defendant was not entitled to dismissal of the indictment or reversal of the conviction); *Burkett II*, 951 F.2d at 1447-48 (reducing defendant's sentence as remedy for sentencing-phase Speedy Trial Clause violation).

Second, the State misreads this Court's precedents regarding sentencing error. *Bozza* rejected a double jeopardy claim brought after the sentencing court belatedly added a fine to a pronounced sentence, as required by statute. *See* 330 U.S. at 166. *Bozza* in turn quotes *In re Bonner*, 151 U.S. 242, 260 (1894), which evaluated the proper habeas corpus remedy where a defendant was remanded to the wrong custodial facility. *Bonner* and *Bozza* describe remedies for technical errors in a sentence's terms and conditions, and neither case purports to announce a categorical limitation on the available remedies for a lengthy failure to sentence someone entirely.

2. The State is also mistaken in arguing that the "common understanding" of the Framers would have

been to see sentencing and trial as procedurally distinct. In the Founding era, sentencing immediately followed, and was often dictated by, the defendant's conviction, such that "trial" and "sentencing" were understood as being one and the same. As one commentator has explained, "[s]tatutes in as many as half of the states during the nineteenth certury granted the criminal jury the power to set the sentence after reaching a guilty verdict in a non-capital case." Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 Yale L.J. 1355, 1373 (1999) (reviewing Kate Stith and José A. Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998)); *ibid.* ("In many American jurisdictions, juries at criminal trials served at one time as the primary sentencing institutions."); *see also* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 1972-73 (2005) ("Unitary capital trials were the norm when the Sixth Amendment was created. The question of guilt and the question of death both were decided in a single jury verdict at the end of a single proceeding conducted as an adversarial trial."). And "[b]ecause at the time of the enactment of the Bill of Rights sentencing usually occurred simultaneously or almost simultaneously with the verdict, to the extent provision of a 'speedy trial' was a de facto reality, speedy sentencing would also have been." Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. Rev. 1771, 1830 n.266 (2003).

The Sixth Amendment's history and purpose support its application to unjustified delay in the sentencing phase. The Court should take this opportuni-

ty to acknowledge the doctrinal roots of its long-running assumption in *Pollard*.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2, 2015